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Supreme Court, U.S.
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In The
**Supreme Court of the United States**
**October Term, 1995**

ERNST & YOUNG LLP, ET AL.,

Petitioners,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, ET AL.

Respondents.

**Petition For Writ of Certiorari To The Supreme Court of Rhode Island**

# BRIEF OF *AMICUS CURIAE* RHODE ISLAND SOCIETY OF CPAS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTEREST OF AMICUS

The Rhode Island Society of Certified Public Accountants ("Society" or "Amicus") is a non-profit professional association founded in 1905. It currently has over 1400 members throughout Rhode Island. The Society's objectives include advocating for the profession of accountancy, maintaining high ethical standards for the profession, promoting and maintaining the profession's Code of Ethics. The Society's interest in this case includes its concern that the decision below may reduce the predictability required to provide professional accounting services to businesses and the public.

More broadly, the Society is concerned that the decision below may encourage other states faced with similar budget crises to adopt other legislation which could be used not only to hold viable firms liable for a disproportionate share of tort liability but also to generate state revenues by retroactively abrogating recognized property interests. The Society believes that the petition of Ernst & Young LLP ("Ernst & Young") should be granted so its members and the community at large may obtain a definitive resolution of the legality of such efforts.

Pursuant to Supreme Court Rule 37.2, the Society has obtained consent for the filing of this amicus brief from counsel for the petitioner and the respondents.

## STATEMENT OF THE CASE

The Society accepts and relies upon the statement of the case contained in the Petition. Pet. at 2-10.

## ARGUMENT: REASONS FOR GRANTING THE WRIT

The single issue presented by this case is whether a state can retroactively abrogate a private litigant's constitutionally protected right to contribution in order to better its own financial position in that litigation. Rhode Island's effort to coerce Ernst & Young and other businesses into settling litigation with DEPCO, a state agency, not only violates their constitutional due process protections against arbitrary state power but also encourages similar behavior by other governmental entities. Such governmental disregard for private property interests should not be sanctioned.

On July 13, 1993, R.I. Gen. Laws § 42-116-40 (the "Act") was signed into law by the Governor. The Act was enacted two years after the credit union collapse and one year after filing of DEPCO's suit against Ernst & Young. Prior to this law, a non-settling defendant in a case arising out of the Rhode Island credit union collapse was treated like any other tort defendant. If ultimately found liable (or if it received a proportionate fault release), it could seek contribution from all other joint tortfeasors except those who had received releases against all other responsible parties. See R.I. G.L. c. 10 - 6 (Uniform Contribution Among Joint Tortfeasors Act); Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95 (R.I. 1995). Pet. at 5a. Contribution would be based upon the other tortfeasors' "proportionate share of liability." Id.

The Act changed that result by allowing any settling party in a DEPCO case to cap its total liability to the detriment of non-settling parties. The Act only applies to claims brought by DEPCO and receivers for Rhode Island-chartered financial institutions. In

all other cases, Rhode Island's traditional rule requiring proportionate fault releases (or leaving settling parties liable for contribution) remains in effect. The decision of the Rhode Island Supreme Court makes it clear that the 1993 Act applies to all pending DEPCO cases, including those begun prior to its passage.

The Rhode Island Supreme Court conceded that Ernst & Young's pre-existing right to contribution "is properly viewed as a property interest subject to the protections of due process." DEPCO v. Brown, supra, Pet. at 12a citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). Rhode Island, like most states, treats the right to contribution as a right arising at the time of the underlying tort, not at the later time that a losing defendant is ordered to pay a judgment. Id.. Since Ernst & Young's right to contribution from other DEPCO defendants arose prior to 1993, the application of Act to this litigation is clearly retroactive. Id.

The Act violates Ernst & Young's due process rights by changing the contribution rules in the middle of DEPCO's lawsuit against Ernst & Young, thereby retroactively depriving Ernst & Young of its pre-existing property right to contribution. The Act retroactively extinguished Ernst & Young's right to pursue contribution from parties who settle with DEPCO. Moreover, the Act provides that any judgment assessed against Ernst & Young will be reduced not by the settling parties' proportionate share of the losses, but only by the amounts actually paid in settlement - a so-called "pro tanto" reduction.

Unlike similar "pro tanto" schemes in certain other jurisdictions, the Act, as interpreted by the Rhode Island courts, does not require a settling defendant to show that the settlement is related to its equitable share of the judgment. Consequently, a court may approve a settlement and offer the settling party contribution protection, even if the settlement is grossly inadequate in comparison to the settling party's true share of liability.

The Act places non-settling parties, such as Ernst & Young, at a severe disadvantage compared to the prior law. Under the Act, a non-settling party may be forced to absorb the difference between the damages caused by a settling party and whatever amount DEPCO accepts from that party in settlement, no matter how insignificant or how disproportionate to the settling party's degree of fault. The Act, therefore, allows DEPCO to settle cheaply with certain parties while leaving Ernst & Young and other potential "deep pockets" liable not only for their own share of the fault (if any), but also for any shortfall caused by the settlement figures.

This gives DEPCO, i.e. the State of Rhode Island, an unwarranted financial advantage at the expense of a private party. Such an outcome is grossly unfair and, therefore, legally insufficient to provide the "rational" basis needed to withstand a constitutional challenge. Moreover, by changing the contribution rules in the middle of the litigation, the state has unfairly pressured Ernst & Young to settle the DEPCO litigation. Retroactive legislation targeted at a specific party cannot constitute a "legitimate" goal for purposes of constitutional analysis and, therefore, should be held unconstitutional. See Shiflet v. Eller, 228 Va. 115, 39 S.E.2d 750 (1984).

## I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS ERRONEOUS BECAUSE THE ACT'S RETROACTIVE DEPRIVATION OF ERNST & YOUNG'S RIGHT TO CONTRIBUTION LACKS A RATIONAL BASIS.

### A. Retroactive Legislation Should Be Viewed With Skepticism And Must Have A Rational Basis.

The state's ability to retroactively deprive a party of a constitutionally protected property interest is an extraordinary power that can so drastically distort reasonable expectations that it should be

reserved for the most extraordinary of cases. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1497 (1994). One major concern about such laws is that "the Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration... and that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Id. See also General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)("problems of unfairness are more serious for retroactive laws than for prospective ones"). That is exactly what the Rhode Island legislature seems to have done in the wake of the RISDIC collapse.

To be consistent with due process, a retroactive statute, like any statute, may not abrogate a property interest unless that action is, at a minimum, justified by a legitimate governmental purpose furthered by rational means. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). However, due to the careful scrutiny given to retroactive legislation, "a justification sufficient to validate a statute's prospective application under the [due process clause] 'may not suffice' to warrant its retroactive application." Landgraf, 114 S. Ct. at 1497 (quoting Usery v. Turner Elkhorn Mining Co, 428 U.S. 1, 17 (1976)). Not only the statute generally but also the retroactive effect of the statute in particular must satisfy the demands of due process.

### B. The Retroactive Deprivation Of A Private Party's Property Interest Is Fundamentally Unfair And Should Not Be Sanctioned.

The court below justified the law as furthering the goal of facilitating DEPCO settlements and so "minimizing the taxpayers' liability." Only last year, this Court rejected that position and held that the pro tanto rule has no clear advantage over the proportionate share rule in promoting settlements. This Court explained that

under either rule parties' desire to settle cases is adequate to ensure nontrial dispositions in the vast majority of cases. See McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1468-69 (1994). The Court noted that the pro tanto rule "comes at too high a price in unfairness." Id. The Rhode Island law is even more unfair than the approach rejected in McDermott. As interpreted by the R.I. Supreme Court in the Brown credit union case, proportionate fault is simply not a necessary consideration in approval of a settlement under the Act. Although the Act makes settlements less risky for DEPCO, it does so at the expense of private parties. DEPCO now can settle with parties for any amount regardless of their proportionate fault without giving up anything because the "deep pocket" of Ernst & Young will remain available for any shortfall.

Clearly, the state is seeking to minimize its cost for a bail-out that it chose to assume, at the expense of private litigants. However, the fact that changing the litigation rules in favor of the government will save it money is insufficient to withstand a constitutional challenge. See O'Melveny & Myers v. FDIC, 114 S. Ct. 2048, 2055 (1994) (ability to obtain more money did not justify special government rights in litigation). In light of the ever present temptation for governments to disregard fair play and existing property interests when faced with a financial crunch, such tactics should be firmly rejected. See, e.g. Winstar Corp. v. United States, 64 F.3d 1531, 64 U.S.L.W. 2133 (Fed. Cir. 1995)(retroactive legislation cannot be used to improve the sovereign's financial position vis-a-vis private parties).

Enhancing the government's potential to obtain more money, at the expense of a private party, does not justify tilting the playing field in favor of the government, particularly during ongoing litigation. Such tactics are patently unfair and should not be sanctioned, particularly where, as here, there is every indication that the state acted with the improper motive of targeting a specific party involved in a specific lawsuit. See Pet. at 7. Cf. United States v. Carlton, 114 S. Ct. 2018, 2023 (1994) (retroactive

limitation of the availability of a tax provision upheld since there was no contention of improper governmental motive such as targeting certain taxpayers for unfair treatment).

By changing the rules of contribution the state has drastically increased the pressure on Ernst & Young to settle the DEPCO litigation. "To the extent there is tension between the goal of promoting settlements and fundamental fairness to litigants, the latter must prevail." TBG, Inc. v. Bendis, 36 F.3d 916,925 (10th Cir. 1994)(quoting United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth., 772 F. Supp. 1565, 1575 (D.S.C. 1991)). Clearly, there is nothing legitimate in the state changing the rules in a manner that disproportionately disadvantages Ernst & Young in pending litigation with the state. Cf. Winstar, supra. Since the state cannot show a "legitimate" end for the retroactive nature of the Act, it should be held unconstitutional. See Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) (law retroactively changing the state's contribution rule held unconstitutional).

Sound policy dictates that the Act be declared unconstitutional since to do otherwise would encourage Rhode Island and other states to abrogate vested property interests merely to offset their own financial obligations. Such retroactive state action undermines the predictability required by businesses and professionals to effectively provide services to their clients and customers.

## II. THE DECISION BELOW CONFLICTS WITH FEDERAL DECISIONS HOLDING THAT NON-SETTLING PARTIES HAVE A DUE PROCESS RIGHT TO MEANINGFUL PARTICIPATION IN SETTLEMENT PROCEEDINGS.

Additionally, the court below erred in approving the settlement without requiring that Ernst & Young be provided with a meaningful opportunity to participate in the settlement approval process.

Since the Act bars non-settling parties from seeking contribution from settling parties and allows only "pro tanto" setoffs, Ernst & Young has a compelling interest in ensuring that DEPCO's settlements with other parties are reasonable. In such circumstances, a number of federal courts have held that non-settling parties must be afforded a meaningful opportunity to participate in settlement approval proceedings. See e.g. , In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020 (2nd Cir. 1992); In re Jiffy Lube Sec. Litig., 927 F.2d 155, 160 n.3 (4th Cir. 1991). Under these decisions, when a third party objects to a settlement, federal courts must "at least evaluate [their] contentions" and "provide [them] with an opportunity for meaningful exposition of their positions." Girsh v. Jepson, 521 F.2d 153, 160 (3d Cir. 1975) (disapproving settlement where third party was denied meaningful participation in fairness hearing). In doing so, the courts consider whether the settling parties made a good faith effort to evaluate the settling parties proportionate liability. See In re Del-Val Fin. Corp. Sec. Litig., 868 F. Supp. 547, 559 (S.D.N.Y. 1994).

The Rhode Island courts however, have determined that the Act allows no such opportunity. Here, during the two weeks between the filing of DEPCO's case against the officers and the settlement, Ernst & Young tried to participate in order to obtain and present evidence on damages, relative strength of the parties' cases, and defendants' financial resources. Pet. at 22. The lower court, affirmed by the Supreme Court, rejected that effort. The pro forma order that the settlement was "fair and reasonable [and] made in good faith . . . " did not reference Ernst & Young's adversely impacted interest or, in view of the denial of its effort to participate, is it a constitutionally binding determination against Ernst & Young.

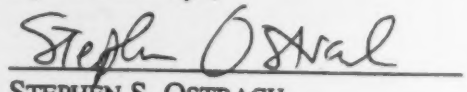
Affording a third party an opportunity to meaningfully participate in a settlement helps to decrease the prospect that a plaintiff will accept inadequate settlements from one or more tortfeasors in situations where a perceived "deep pocket" exists

from whom the remainder of any judgment may be collected. Such participation is necessary in light of the fact that the pro tanto rule itself leaves "the field of settlement very much open to collusive arrangements between a plaintiff and a favored joint tortfeasor." Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1967). This Petition should be granted to reestablish the longstanding principle that fundamental fairness in litigation is not disposable at the unilateral whim of a government plaintiff.

## CONCLUSION

For the reasons set forth above, the Society respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the Rhode Island Supreme Court.

Respectfully submitted,
RHODE ISLAND SOCIETY OF CPAS
By its attorneys,



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